

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FRED H. ISAACSON,

Plaintiff,

v.

KAREN DANIELS *et al.*,

Defendants.

Case No. C05-5497FDB

REPORT AND
RECOMMENDATION

**NOTED FOR
December 9th, 2005**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. On September 6th, 2005 the court ordered plaintiff to show cause why this action should not be dismissed as the action challenges the legality of plaintiff's current confinement. (Dkt. # 6). Plaintiff sought and received an extension of time to respond. (Dkt. # 7 and 8). The time for a response has expired and this action appears to challenge the propriety of plaintiff's current confinement. Plaintiff has not responded to the court's order to show cause.

FACTS

Plaintiff asks the court to mandate or allow him to file an "out of time appeal in state court." (Dkt. # 5). Plaintiff challenges conditions at the county jail but also seeks the ability to proceed in habeas. The court ordered plaintiff to show cause and specifically informed him:

1 A complaint is subject to dismissal prior to service with the dismissal counting as a
 2 strike for purposes of 28 U.S.C. 1915 (g). When a complaint is frivolous, fails to state a claim,
 3 or contains a complete defense to the action on its face, the court may dismiss an in forma
 4 pauperis complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809
 5 F.2d 1446, 575 (9th Cir.1987) (citing Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir.
 6 1984)). A plaintiff must allege a deprivation of a federally protected right in order to set forth a
 7 prima facie case under 42 U.S.C. §1983. Baker v. McCollan, 443 U.S. 137, 140 (1979).

8 In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the
 9 conduct complained of was committed by a person acting under color of state law and that (2)
 10 the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or
 11 laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other*
 12 *grounds*, Daniels v. Williams, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to
 13 remedy an alleged wrong only if both of these elements are present. Haygood v. Younger, 769
 14 F.2d 1350, 1354 (9th Cir.1985), *cert. denied*, 478 U.S. 1020 (1986).

15 Here, plaintiff challenges his plea agreement and access to courts for his criminal trial.
 16 When a person confined by the state is challenging the very fact or duration of his physical
 17 imprisonment, and the relief he seeks will determine that he is or was entitled to immediate
 18 release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas
 19 corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973). In June 1994, the United States
 20 Supreme Court held that "[e]ven a prisoner who has fully exhausted available state remedies
 21 **has no cause of action under § 1983 unless and until the conviction or sentence is**
 22 **reversed, expunged, invalidated, or impugned by the grant of a writ of habeas**
 23 **corpus.**" Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994)(emphasis added). The court added:

24 Under our analysis the statute of limitations poses no difficulty while the state
 25 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]
 26 § 1983 cause of action for damages attributable to an unconstitutional
 27 conviction or sentence does not accrue until the conviction or sentence has been
 28 invalidated.

29 Id. at 2374. "[T]he determination whether a challenge is properly brought under § 1983 must be
 30 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily
 31 to imply the invalidity of the judgment.' Id. If the court concludes that the challenge would
 32 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge
 33 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,
 34 120 F.3d 1023, 1024 (9th Cir.1997) (quoting Edwards v. Balisok, 117 S.Ct. 1584, 1587
 35 (1997)).

36 Plaintiff asks the court to allow or order that he file a direct appeal. That is an issue
 37 plaintiff must bring to the state courts before filing in this court and the proper remedy appears
 38 to be in habeas corpus if plaintiff is seeking relief from incarceration. The court is aware that
 39 this plaintiff previously filed for habeas relief. That action was dismissed without prejudice as
 40 the petition appeared to be a mixed petition and plaintiff did not amend or show the issues
 41 raised were exhausted. Plaintiff has not shown his conviction has been "reversed, expunged,
 42 invalidated, or impugned by the grant of a writ of habeas corpus." Heck v. Humphrey, 114
 43 S.Ct. 2364, 2373 (1994). At this point, the court must dismiss the plaintiff's 42 U.S.C. § 1983
 44 claim for failure to state a claim.

45 The court does not believe plaintiff can cure these defects, however, plaintiff should be
 46 given a chance to respond. Accordingly, plaintiff is **ORDERED TO SHOW CAUSE** why
 47 this action should not be dismissed. Plaintiff's response to this order is due on or before
 48 October 7th, 2005.

Plaintiff has now been given the opportunity to avoid dismissal and has not responded. Accordingly

1 this court recommends that this action be dismissed without prejudice as plaintiff may not seek habeas relief in
2 a civil rights action.

3 CONCLUSION

4 An action that seeks to challenge the validity of confinement must proceed by way of habeas with its
5 attendant exhaustion requirement. This action must be dismissed without prejudice. A proposed order
6 accompanies this Report and Recommendation.

7 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the
8 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.
9 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.
10 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to
11 set the matter for consideration on **December 9th, 2005**, as noted in the caption.

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14 DATED this 15th day of November, 2005.

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16 /s/ J. Kelley Arnold
17 J. Kelley Arnold
18 United States Magistrate Judge
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